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July 9, 1999

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BY HAND

Magalie Roman Salas, Esquire
Secretary
Federal Communications Commission
The Portals
445 12th Street, SW, Room TWB204
Washington, D.C. 20554

Re: PR Docket No. 92-235
Petition for Partial Stay

Dear Ms. Salas:

Transmitted herewith, on behalf of Forest Industries Telecommunications, are original and 4 copies of its *Petition for Partial Stay*.

Should any questions arise concerning the matter, please communicate with this office.

Very truly yours,

Paul J. Feldman

PF:jpg
Enclosure

ORIGINAL

Before the
Federal Communications Commission
Washington DC 20554

In the Matter of	)	
	)	
Replacement of Part 90 by Part 88 to	)	
Revise the Private Land Mobile Radio	)	
Services and Modify the Policies	)	
Governing Them.	)	
	)	PR Docket No.92-235
and	)	
	)	
Examination of Exclusivity and	)	
Frequency Assignment Policies of	)	
the Private Land Mobile Radio Services	)	

To: The Commission

PETITION FOR PARTIAL STAY

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July 9, 1999

TABLE OF CONTENTS

SUMMARY

The Forest Industries Telecommunications ("FIT") seeks to stay the effectiveness of that part of the *Second Memorandum Opinion and Order* in this proceeding which amends Section 90.35(b) of the Commission's Rules to designate the petroleum and power frequency coordinators as the mandatory coordinator(s) for the frequencies in the 150-160 and 450-470 MHZ band which were shared by the Power, Petroleum, and the Forest Products Radio Services, prior to the consolidation of the private land mobile radio services by the Commission's *Second Report and Order* in this proceeding. The Stay should be made effective immediately and should remain effective pending the filing by FIT and disposition by the Commission of a petition for reconsideration of the above-described decision.

The stay should be granted for the following reasons. First, Petitioner is likely to prevail on the merits because the Commission's action on this issue is unlawful in that it was adopted without compliance with the prior notice and comment requirements of the Administrative Procedures Act. Furthermore, the decision is arbitrary, unreasonable and not adequately justified. Second, if allowed to remain effective, the decision would cause serious and irreparable injury to FIT: FIT will lose a substantial portion of the revenues it now earns from its coordination services and to members of the forest products industry, and FIT is likely to lose a substantial portion of its coordination customers and membership. Third, grant of the stay would not cause significant injury to any other parties, since interference among communications in the industries involved has been handled well for years under the current system, and can continue effectively until Commission resolution of petitions for reconsideration the most recent decision. Lastly, grant of a stay would be in the public interest by returning the matter to *status quo* until

the Commission takes another, serious look at its decision, the legal basis thereof, and at the consequences of that decision on FIT, its constituents, and on other interested entities and industries and in the public interest.

Before the
Federal Communications Commission
Washington DC 20554

In the Matter of	)	
	)	
Replacement of Part 90 by Part 88 to	)	
Revise the Private Land Mobile Radio	)	
Services and Modify the Policies	)	
Governing Them.	)	
	)	PR Docket No.92-235
and	)	
	)	
Examination of Exclusivity and	)	
Frequency Assignment Policies of	)	
the Private Land Mobile Radio Services	)	

To: The Commission

PETITION FOR PARTIAL STAY

Forest Industries Telecommunications ("FIT")[1], by counsel and pursuant to Sections 1.41 and 1.429(k) of the Commission's Rules, 47 CFR 1.41 and 1.429(k), hereby petitions the Federal Communications Commission ("FCC" or "Commission") to stay the effectiveness of that part of the Second Memorandum Opinion and Order, ("*Second MO&O*") released in the above-

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[1]FIT is a trade association representing the land mobile communications interests of the forest products industry and a certified frequency coordinator. It had been coordinating frequencies for that industry for over fifty years and it is now one of the coordinators of the frequencies in the industrial/business pool. This petition is filed on FIT's own behalf as well as on behalf of its constituent members.

referenced proceeding on April 13, 1999, FCC 99-68,[2] which amends Section 90.35(b) of the Commission's Rules to designate the petroleum and power frequency coordinators as the mandatory coordinator(s) for the frequencies in the 150-160 and 450-470 MHz band which were shared by the Power, Petroleum, and the Forest Products Radio Services[3], prior to the consolidation of the private land mobile radio services by the Commission's Second Report and Order in this proceeding.[4] Those frequencies are described in Instruction No. 4, Appendix C, to the *Second MO&O*, on page 38 and are listed on pages 39 to 46. The stay should be made effective immediately and should remain effective pending the filing by FIT and disposition by the Commission of a petition for reconsideration of the above-described decision.[5]

Briefly, the stay should be granted because the decision is legally flawed, in that it was adopted without compliance with the prior notice and comment requirements of the

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[2]The *Second MO&O* was published in the *Federal Register* on July 6 1999, 64 FR 36258.

[3]See frequency tables in former Sections 90.63(e), 90.65(b) and 90.67(b), 47 CFR 90.63(c), 90.65(b) and 90.67(b) (1996). FIT directs its petition to the Commission's decision concerning the frequencies previously shared by the former Power, Forest Products and Petroleum Radio Service. The decision also includes frequencies previously shared by the former Manufacturers Radio Service, the former Railroad Radio Service and by other former land transportation services, as well as frequencies previously allocated in the former Automobile Emergency Radio Service. Although FIT is concerned about and will be adversely affected by the entire decision in the *Second MO&O* to change the coordination requirements of Section 90.35(b), this Petition is directed to that aspect of the decision which affects coordination of the frequencies of the forest products industry shared with the former Petroleum and Power Radio Services because that part of the decision will have the most immediate and most harmful adverse affect on FIT and on its constituents.

[4]*Second Report and Order*, PR Dkt 90-235, 12 FCC Rcd 14307 (1997).

[5]Although the *Second MO&O* disposed petitions for reconsideration, it is itself subject to reconsideration because it modified rules adopted in the *Second Report and Order*. See Section 1.429(i) of the Rules.

Administrative Procedures Act;[6] and it is arbitrary, unreasonable and not adequately justified. The decision, if allowed to remain effective, would cause serious and irreparable injury to FIT and to FIT's members and to the forest products industry. Grant of the stay would be in the public interest by returning the matter to *status quo* until the Commission takes another, serious look at its decision, the legal basis thereof, and to the consequences of that decision on the public interest. In support hereof, the following is shown

I. Background

1. In its *Second Report and Order* in this proceeding, the Commission designated the Power Coordinator as the mandatory exclusive coordinator for the frequencies previously allocated exclusively to the former Power Radio Service in the 150-173 and 450-470 MHz bands, the Railroad Coordinator for the frequencies in those bands previously exclusively allocated to the Railroad Radio Service, and the Petroleum Coordinator for the frequencies in those bands previously allocated exclusively to the Petroleum Radio Service[7]. The American Petroleum Institute ("API") sought reconsideration of that decision and proposed a change to require concurrence by the Petroleum Coordinator of applications proposing assignment of previously shared frequencies occupied in the area by existing petroleum land mobile systems if the proposed non-petroleum system would interfere with existing, co-channel petroleum systems[8]. FIT supported API's proposal, agreeing with API that existing systems should receive

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[6] 5 U.S.C. §553 (1996).

[7] *Second Report and Order*, at 14330.

[8] See API Petition for Reconsideration addressed to the *Second Report and Order*, filed on May 19, 1997, pp. 6-8. API proposes that industry concurrence be required for the grant of any

the protection against potential interference API had proposed[9]. Neither API, UTC or AAR requested expansion of their exclusive coordination authority to include the previously shared frequencies.

2. Nevertheless, the Commission, with minimal explanation and without adequate justification, amended Section 90.35(b) of its Rules and expanded the authority of the petroleum, power, and railroad coordinators to encompass all of the frequencies the former power, petroleum, railroad, and appointed AAA as the exclusive coordinator for the frequencies the former Automobile Emergency Radio Service shared with other services.[10] In doing so, the Commission effectively revoked FIT's authority to coordinate practically all of the frequencies FIT has coordinated for its constituent members in the forest products industry for over half a century, as well as the former land transportation shared frequencies. Yet, the Commission gave

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application that seeks authority to share any channel currently allocated to the Petroleum Radio Service in which the applicant's system would infringe on the existing system in excess of the following values:

> For UHF systems operating in the band 450-470 MHz, an applicant's 21 dBu contour may not impinge upon the 39 dBu contour of the existing system; for VHF systems employing channels from the 150-174 MHz band, an applicant's 19 dBu contour may not encroach upon the 37 dBu contour of the existing system; and for systems operated on channels below 50 MHz, an applicant's 23 dBu contour may not encroach upon the 30 dBu contour of an existing system.
> API Petition for Reconsideration, at page 8.

[9]See Comments of Forest Industries Telecommunications on Petitions for Reconsideration, filed in PR Dkt 92-235 in June 1997, pp 6-7.

[10]As noted above, in Footnote 3, the former Forest Products Radio Service, for which FIT was the certified coordinator, shared most of the frequencies allocated to it prior to the *Second Report and Order*, with the former Power and the Petroleum Radio Services.

no consideration to the impact of its decision on FIT or on the forest products industry. Furthermore, the Commission did not take into account the fact that FIT, UTC, and API had coordinated the very same frequencies successfully for over half a century. The Commission offered no reasonable explanation, nor indeed any explanation, why the coordination performed by FIT, API and UTC coordinators of the same shared frequencies for over half a century now raise significant safety issues.

3. The failure of the commission to provide adequate justification for its decision, its failure to evaluate the impact of that decision on FIT and on the forest products industry, and importantly, its failure to afford FIT, the forest products industry and the other interested parties a reasonable opportunity to comment prior to the adoption of such an important decision, renders that decision arbitrary and capricious and one that should be stayed.

II. Grant of the Stay is Justified

4. To determine whether a stay should be granted, the following factors are considered: (1) the likelihood that the party seeking the stay will prevail on the merits; (2) the likelihood that the moving party will be irreparably harmed without a stay; (3) the prospect that others will be harmed by the grant of the stay; and (4) whether the public interest would be served by the grant of the stay. *Wisconsin Gas Co. v. F.E.R.C.*, 758 F. 2nd 669 (D.C. Cir. 1985); *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F 2nd 841 (D. C. Cir. 1977); *Virginia Petroleum Jobbers Assn' v. FFC*, 259 F. 2nd 921 (D.C. Cir. 1958); *Arkansas Peace Center v. Defendant of Pollution Control*, 992 F. 2nd 147 (8th Cir. 1993). FIT's stay is fully justified and should be granted because FIT is likely to prevail on the merits, FIT would be irreparable injured absent a stay, API & UTC would not be unreasonably harmed if the stay is

granted, and the public interest would be served by grant of the stay. Indeed, under the Holiday Tours case, if a petitioner makes a strong showing in the last three factors, in lieu of making a strong showing on the likelihood to prevail factor, the petitioner need only show that a serious legal question has been presented.[11]

a. FIT is Likely to Prevail on the Merits.

5. Section 553 of the Administrative Procedures Act, 5 U.S.C. 553, requires federal agencies to give notice and an opportunity to submit comments before they may adopt, amend, modify or repeal a rule. See *American Hospital Association v. Brown*, 834 F. 2nd 1037, 1044 (D.C. Cir. 1987). Here, the Commission, amended Section 90.35(b) substantially without giving notice nor affording a reasonable opportunity to FIT and to other interested parties to submit comments on that amendment.

6. The change to Section 90.35(b) is not interpretative, procedural, or a statement of general policy. It is substantive and substantial. It removed over 170 frequencies from the current pool of frequencies that may be coordinated under the current, competitive frequency coordination system. The decision denies applicants desiring to use one or more of those frequencies the right to choose among the current, competing coordinating entities. The change revokes FIT's and the other affected coordinators' authority to coordinate applications for the frequencies in question. In short, the amendment to Section 90.35(b) is the type of rule making

[11]Alternatively, the Commission has the equitable power to grant a stay upon showing of harm to the petitioner and no harm to other parties, without reaching the question of the likelihood of petitioner's success on the merits. See *Booth American Co. Petition for Stay of Action*, 11 FCC Rcd. 4196, 4197 (Cable Services Bureau, 1996).

to which the prior notice and comment requirements of the APA apply. Cf. *American Hospital Association, supra*, at 1044.

7. The amendment was not within the scope of the proposals in the record on which the Commission's decision was based. It was not proposed in any petitions for reconsideration, nor in any of the comments on these petitions. It was not requested by API, UTC, AAR, nor by AAA. It was not within the scope of nor a reasonable response to API's petition for reconsideration. API merely asked for the opportunity to concur on applications for systems that would place an interfering signal within the service area of existing petroleum systems.[12] The Commission denied API's request and adopted instead the far reaching amendment to Section 90.35(b) at issue here.

8. In sum, neither FIT nor any other interested party had reasonable notice of the Commission's intention to modify Section 90.35(b) in the manner and to the extent it was amended. Therefore, the amendment was adopted in violation of the Administrative Procedure Act and, therefore, it is unlawful. The decision is also arbitrary, unreasonable and unsupported by the record. As previously noted, the only pertinent proposal before the Commission was API's petition for reconsideration,[13] which merely sought a degree of protection for existing systems. The Commission's rejection of that proposal, which would have accommodated the needs of the petroleum industry, was unreasonable. The Commission rejected API's proposal

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[12]See API's Petition for Reconsideration at p. 8.

[13]The Commission also makes reference to a joint petition for a "freeze", filed by UTC and API in another context, that is, RM-9405. However, the Commission properly concluded that the UTC/API "freeze" petition "...is beyond the scope of the matters contained in the Second Report and Order," and that "...will be resolved separately...." Second MO&O, Par 13.

not because it was not reasonable, impractical, opposed, or inconsistent with the public interest but because, according to the Commission, "...the issue of whether to provide protected contours (i.e. exclusivity) to Part 90 licensees generally is the subject of another aspect of the proceeding...." *See Second MO&O,* Par. 8. However, API did not propose protected service contours for exclusivity. It merely proposed the use of service and interfering contours for the sole purpose of determining whether the concurrence of the petroleum coordinator should be required. Thus, the reason given by the Commission for rejecting the API proposed alternative is not logical or relevant. Even less rational and totally unsupported by the record is the Commission's decision to jump from API's proposal to the decision to eliminate coordination of applications for over 170 channels, whether or not applications for such frequencies would impinge on existing systems. The Commission's failure to adopt the less restrictive and less onerous alternative proposed by API, or a variation thereof, without adequate justification, amounts to arbitrary and capricious decision making and violates the basic tenants of the Administrative Procedure Act. *Motor Vehicle Manufacturers Assn' v. State Farm Mutual Ins. Co.,* 463 U.S. 2977, L Ed. 2nd 443 (1983).

9. Moreover, the Commission failed to consider the fact that the frequencies for which the Commission made the petroleum and or the power coordinators the sole mandatory coordinators had been shared for decades by the former Forest Products, Petroleum and Power Radio Services (and some by other services) and were coordinated, respectively, by FIT, API and UTC very successfully. Furthermore, the Commission also ignored the fact that the petroleum industry to a degree is regional and, therefore, it does not use heavily, if at all, many of the

frequencies involved in many areas of the country. In those areas, where the petroleum industry makes little, if any, use of the frequencies, exclusive mandatory coordination by the petroleum coordinator would serve no useful purpose.

10. In sum, because the amendment to Section 90.35(b) was adopted without compliance with the notice and comment requirements of the Administrative Procedure Act and because the Commission's decision to amend Section 90.35(b) is unsupported by the record, it is not adequately justified, and it is otherwise unreasonable, it is very likely that FIT would prevail on the merits in its request for reconsideration or appeal of that decision.[14]

(b) FIT is Likely to Suffer Irreparable Injury.

11. Absent a stay, FIT would be irreparably injured by the Commission's decision in the following ways: first, FIT will lose a substantial portion of the revenues it now earns from its coordination services and those losses would not be recoverable; second, FIT would very likely lose to API or to UTC much of its traditional coordination customer base, the members of the forest products industry; and third, FIT stands to lose substantial portion of its membership. Cumulatively, the loss of income, the potential loss of coordination customers, and the potential loss of its membership threatens the viability of FIT as a coordinating entity and as an organization.

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[14]As the court pointed out in *Population Institute v. McPherson*, 797 F. 2d 1068, 1078 (D.C. Cir. 1986), "Petitioners need not establish an absolute certainty of success. Instead, petitioners must show that they are likely to succeed on their merits."

12. Prior to the consolidation of the private land mobile radio service, FIT was the exclusive coordinator for the former Forest Products Radio Service. It coordinated applications in that service for over fifty years. Most of the frequencies allocated to the former Forest Products Radio Service were also allocated to the former Petroleum and to the former Power Radio Services. Under the consolidation of the services ordered by the Commission in its *Second Report and Order*, those frequencies became available to all eligibles in the Industrial/Business Pool. Nevertheless, members of the forest products industry continue to seek coordination from FIT for new systems and especially for changes to existing systems.[15] Thus far, most of FIT's revenues for coordination in the past two years, have been generated by coordination services involving the frequencies formerly shared with the petroleum and with the utilities industries. The *Second MO&O* revokes FIT's authority to coordinate those frequencies and eliminates that source of FIT's coordination income. That loss, clearly, is not recoverable. Unrecoverable loss of income constitutes irreparable harm. *Wisconsin Gas Co. v. F.E.R.C.*, 758 F. 2nd 669 (D.C. Cir. 1985); *Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F. 2nd 841 (D.C. Cir. 1977). See also: *Baker Electric Coop. v. Chaske*, 28 F. 3rd 1473 (8th Cir. 1994); *Airline Reporting Co. v. Berry*, 825 F. 2nd 1220, 1227 (8th Cir. 1987).

13. Loss of authority to coordinate the frequencies in question will likely result in the loss of much of FIT's coordination customer base to petroleum and to power coordinators, since those coordinators will now have the exclusive authority to handle the applications of forest

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[15]According to FIT's own records, during the past two years, nearly 93% of the applications of its members involved the previously shared frequencies. Those frequencies will no longer be available to FIT for coordination, except where the petroleum and the power coordinators concur.

products industry members for changes in their communications systems operating on the frequencies in question. As a result, those customers, or many of them, will be lost to FIT while the *Second MO&O* remains in effect. Loss of customers has been held to constitute irreparable harm. *Multi-Channel Cable Co. v. Charlottesville Authority Cable Operating Co.*, 22 F 3rd 546, 557 (4th Cir. 1994). Additionally, loss of authority to coordinate the frequencies in question would eliminate a major reason for maintaining membership in FIT by members of the forest products industry because coordination service is one of the major services FIT provides its members. Thus, loss of authority to coordinate the industry's core frequencies would not only result in non-recoverable economic loss to FIT, but could threaten its very existence as a membership organization.

14. The forest products industry itself will suffer substantial injury as well. Forest products companies will lose a substantial degree of access to the frequencies on which the industry's mobile communications system predominately operate because the petroleum and the power coordinators have been given the authority to deny access to those frequencies to non-petroleum, non-utility entitles. See *Second MO&O* at par. 29. Moreover, forest industry companies will lose the option they now have to chose FIT to coordinate their applications, as they have for nearly fifty years, or to chose any of the other competitive coordinators. Other industries and businesses will lose a degree of access to those frequencies (again, because the mandatory coordinators will have the authority to deny coordination requests for those frequencies) and will lose the benefits of competitive coordination with respect to the 170+ frequencies involved. In sum, not only FIT, the forest products industry but others will be harmed and the harm will be substantial and not be recoverable.

c. Injury to Other Parties will be Minimal.

14. Since neither API nor UTC (nor AAR or AAA) requested the rule amendment at issue here, the Commission may reasonably conclude that a temporary suspension of the rule would not unduly adversely affect their interests. Concerns about interference to safety related communications in the industries involved can be addressed reasonably well within the current coordination process. Under current rules, coordinators are required to notify all other coordinators within one day after a frequency recommendation is made. See Section 90.176 of the Commission Rules. If the notice requirement under Section 90.176 is timely and properly given, the petroleum and/or power coordinators can and should be able to take the appropriate actions to prevent the authorization of potentially incompatible systems. Accordingly, the potential for harm to the petroleum and the utilities industries by the grant of stay is not substantial enough to outweigh the potential harm to FIT, to the forest products industry and to other coordinators that would result from a denial of a stay.

(d) The Public Interest Will be Served by Grant of a Stay.

15. Since, as has been shown above, the Commission's decision at issue is legally flawed, the public interest would be best served by the grant of the stay, for a number of reasons. The stay will return the matter to *status quo ante* so that the Commission will have a fresh opportunity to reconsider the matter fully. With the stay, the Commission's competitive coordination system will continue to provide applicants with the substantial choices for coordination and frequencies the current rules provide. Finally, the stay will avoid making effective during reconsideration a decision which very likely is arbitrary, capacious, and inconsistent with the public interest.

III. CONCLUSION

For the foregoing reasons, FIT respectfully submits that a partial stay of the *Second MO&O* requested is fully justified and should be granted as soon as possible.

Respectfully submitted,

FOREST INDUSTRIES TELECOMMUNICATIONS

By _____
George Petrutsas
Paul J. Feldman
Its Counsel

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July 9, 1999

CERTIFICATE OF SERVICE

I, Joan P. George, a secretary in the law firm of Fletcher, Heald & Hildreth, hereby certify that on this 9th day of July, 1999, copies of the foregoing *Petition for Stay* were served on the parties listed below by hand delivery or first class mail:

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